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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

FRED W. CRAMER, IRA B. CRAMER, AND Central Pacific Railway Company, appellants,
v.
UNITED STATES OF AMERICA.
No. 207.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

A more complete statement than that contained in appellants' brief is deemed necessary to a clear presentation of the questions to be considered.

This is a suit by the United States to protect two Indian families, the remnants of a tribe or band, in their use, occupation, and enjoyment of 400 acres of land in Siskiyou County, California, which were patented on July 21, 1904, to the Central Pacific Railway Company under the Act of July 25, 1866 (14 Stat. 239), and to cancel the patent that, it is claimed, was inadvertently issued to the railway company.

The first amended bill of complaint alleged that "for many years prior to July 21, 1904, and from time immemorial the following described lands were Indian lands, occupied, used, enjoyed, and claimed by the Indians, and that during all the said time none of the rights and claims of said Indians in and to said lands and premises had been extinguished" (R. 2); and that the Indians had cleared the lands, built fences, barns, and houses, and made other valuable improvements thereon, all of which were well known to all of the defendants prior to the issuance of the patent to the railway company.

The bill further alleged that the lands were included within the limits of a reservation made for the Klamath, Shasta, and Scott's River tribes of Indians by a treaty entered into November 4, 1851, between certain chiefs, captains, and headmen of the Indians, and one Redick McKee, United States Indian Agent, and Commissioner on the part of the United States, which treaty was approved by the Commissioner of Indian Affairs, and transmitted by the President of the United States to the Senate on June 1, 1852, where it was pending at the date of the grant made by the Act of 1866, and on the date of definite location of the railroad.

The bill further alleged that in issuing the patent to the railway company, the plaintiff acted by mistake and inadvertently, and as the defendants Cramer claimed some right, title, or interest in the land, the extent and nature of which was unknown to

the plaintiff, the bill prayed that they be compelled to set forth their claim with particularity. (R. 5.)

The defendants filed motions to dismiss and to make the bill more definite and certain (R. 18, 21), which were overruled by the District Court (R. 23), and they then answered, disclaiming knowledge as to the length of time or precise territorial extent of the occupation by Indians of the lands described in the bill of complaint, but denying that the Indians named, George and Maggie Wall and Ellen Ruff, or their ancestors, had actually, uninterruptedly, or continuously occupied, used, cultivated, improved, or enjoyed the lands from a time prior to the definite location of the railroad by the Central Pacific Railway Company, or its predecessors in interest, which was on August 7, 1871. (R. 25, 26.)

The answer further averred that for several years past the occupancy of the lands by the Indians had been under and pursuant to lease from the defendant railway company to the United States. The answer also denied that the treaty of 1851 between Redick McKee and the Indian chiefs and captains was pending before the Senate at the date of the grant to the railroad company, and averred that it had been expressly rejected. (R. 27.)

The answer also averred that the lands had been sold by the railway company to the defendants Cramer under executory contracts of October 25, 1916, and February 5, 1917, said sale to be subject to the leases made by the United States for the benefit of the Indians. (R. 29–30.)

The answer also set up the defense of the statute of limitations in the Act of March 3, 1891 (26 Stat. 1099), and the Act of March 3, 1896 (29 Stat. 42). (R. 32, 33.)

At the hearing the Government introduced a plat which, it is stipulated, shows the location of the improvements of the Indians where they now live (R. 70), and proved by the testimony of two witnesses that they have lived where they now live since 1859. (R. 51, 55.) The Government also offered testimony of another witness, who, testified that he knew the Indians had been living where they now live since 1864. (R. 54.)

The plat offered by the Government shows dwelling houses and other buildings, together with a fence, inclosing about 175 acres, including most of the buildings, gardens, and fields.

The Government also proved by the testimony of the Chief of the Land Division of the Indian Office at Washington, D. C., that at the time of the execution of the leases the witness who acted for the Indian Office in the matter did not know that the occupation of the Indians antedated the time when the grant to the railway company took effect. (R. 64.)

Upon the closing of the Government's case, the defendants again moved that the bill be dismissed for want of proof. This motion was denied, and they then offered evidence, not included in the record on appeal, showing that the treaty between Redick McKee and the Indians had been expressly rejected

by Congress in 1852; and also offered evidence tending to show that the reservation set apart by that treaty did not include the land in controversy, and from this evidence the District Court found that the proposed reservation did not include the lands. (R. 49.)

After the submission of the case, the plaintiff in open court, over the objection of the defendants, applied for and obtained leave to present a second amended bill of complaint. This bill alleged that in bringing the suit the Government acted in its own right and as guardian of its Indian wards named in the bill, and omitted all reference to the treaty which the defendants had proved had been rejected by the Senate. In this bill it was also averred that the lands were excepted from the grant to the railway company by reason of the fact that at the time of the definite location of the road, and even prior to the date of the Act making the grant, they were occupied, used, and enjoyed by their present Indian occupants and their ancestors. (R. 38.)

The District Court held that the averments in the second amended bill of complaint would be deemed denied, and overruled the motion of the defendants that the case be reopened in order that they might offer evidence to show that the Indians had not occupied the land for the time set forth in the bill and established by the testimony of the Government's witnesses. This action of the court was based upon the ground that the matter of residence

by the Indians was in issue originally, and that it was the duty of the defendants to offer their evidence at that time. (R. 68.)

The trial court, in a written opinion, found that the lands which formed a portion of sections 13 and 23 in Township 43 North, Range 8 West, M. D. M., are within the limits of the grant made by the Act of July 25, 1866, to the California & Oregon Railroad Company, definite location of which was fixed August 7, 1871; that the defendant, Central Pacific Railway Company, succeeded to all the rights of the California & Oregon Railroad Company under the grant, and on July 21, 1904, received a patent for the two sections named. The court also found that as early as 1859 Ellen Ruff and Maggie Wall, full-blood Indians, and the latter's husband, George Wall, a half-breed, were, as children, living with their parents upon the lands in controversy and had resided there continuously up to the present time; and that they have under fence from 150 to 175 acres in an irregularly shaped tract lying along a creek that flows diagonally through the two sections, and have irrigated and cultivated parts of the same; that they have constructed and maintained dwelling houses and divers outbuildings; and that it can not be questioned that they have actually resided upon the lands and improved them for the purpose of making a home for themselves.

The court further held that:

> While at the time the granting act was passed and when the line of road was definitely

> located there were no express statutes authorizing Indians in their individual capacity to acquire title to lands either by preempting or homesteading them, in view of the well-known desire of the Government that Indians abandon their nomadic life and take up places of fixed abode and adopt the habits of civilization, it is difficult to believe that by the grant in question Congress intended to wrest from individual Indians, without compensation, homes which in good faith they had selected and improved upon public lands recognized as a part of the Indian country. It may be conceded that the right was only one of occupancy, and that, as the law stood at that time, it could not ripen into title. But even so, it was a substantial right which was respected by the Government and was not to be invaded by private individuals, without authority of law, and hence may very well be regarded as falling within the excepting terms "reserved * * * or otherwise disposed of." It is accordingly held that such title as the railroad company acquired is subject to the Indian right of occupancy which can be interfered with or terminated only by the United States. (R. 43.)

The court accordingly ordered the entry of a decree declaring the right of the Indian occupants to remain in possession until otherwise directed by the United States, but limiting their right of possession to the land actually enclosed by the fence.

From the decree entered in accordance with that opinion the defendants appealed to the Circuit

Court of Appeals (R. 71), and the Government filed a cross appeal assigning error in the court's refusal to cancel the patent and in failing to protect the Indians in their possession of the entire area of each legal subdivision in which they had made improvements. (R. 87.)

The Circuit Court of Appeals, in a well-considered opinion, reversed the action of the District Court on the Government's cross appeal, and ordered the entry of a decree canceling the patent as to 360 acres of land. (R. 98, 102; 276 Fed. 78.)

ARGUMENT.

I.

The decree is supported by the policy of Congress.

The decree undoubtedly finds support in the policy of the Department of the Interior, and that is but a reflection of the policy of Congress as expressed in numerous Acts of that body and announced in many decisions of this court. The Indian right of occupancy has always been held sacred by the courts. As early as 1823, in *Johnson* v. *McIntosh*, 8 Wheat. 543, the Supreme Court said, speaking of the attitude of European countries toward the Indians upon the discovery of America, that the discoverers, while claiming the right to acquire and dispose of the soil, recognized the right of occupancy or usufructory right in the natives, and they accordingly made grants of land occupied by Indians which were held to convey a title to the grantees, subject only to the Indian right of occupancy.

Chief Justice Marshall delivered the opinion of the court in that case, and added that the history of America, from its discovery to that date, proved the universal recognition of that principle. To the same effect see *Beecher* v. *Wetherby*, 95 U. S. 517; *United States* v. *Thomas*, 151 U. S. 577; and *Minnesota* v. *Hitchcock*, 185 U. S. 373.

By a circular of May 31, 1884, 3 L. D. 371, which was reissued October 26, 1887, 6 L. D. 341, registers and receivers of local land offices throughout the country were directed by the Commissioner of the General Land Office to peremptorily reject all entries and filings attempted to be made on lands in the possession of Indians who had made improvements of any value thereon. This circular was reapproved December 30, 1903, 32 L. D. 382, and its provisions were enforced July 7, 1892, in the case of *Poisal* v. *Fitzgerald*, 15 L. D. 19.

We concede that the policy of the Land Department can not contravene that of Congress, but contend, as stated, that this policy simply reflects that of Congress in legislation regarding the Indians.

In the general preemption Act of September 4, 1841, 5 Stat. 453, the right of preemption was granted for lands the Indian title to which had been extinguished; and in the grant to the Northern Pacific Railroad Company in the Act of July 2, 1864, 13 Stat. 365, there was a provision to the effect that the Indian title would be extinguished as rapidly as might be consistent with public policy and the wel-

fare of the Indians. It clearly shows that Congress intended the grant to take effect upon the extinguishment of the Indian title.

II.

The grant to the railroad company excepts lands that were in the actual occupation of the Indians.

This case is not controlled by the decision of this court in *Buttz* v. *Northern Pacific Railroad Co.*, 119 U. S. 55, because the grant in that case was to take effect through the Indian country when the Indian title was extinguished, and, as a matter of fact, the Indian title had been extinguished when the grant was held to be effective.

In making the grant to the Northern Pacific Railroad Company Congress realized that the entire country through which the line of road would run was subject to the right of Indian occupancy, or was Indian country, and therefore it declared, in the second section of the Act, that the United States would extinguish as rapidly as might be consistent with public policy and the welfare of the Indians their title to all lands falling under the operation of the Act. For that reason the court held that the lands in the occupancy of Indians were not of the classes that were excepted from the operation of the grant, because that was clear from the face of the Act itself. In other words, Congress intended that as to such lands the grant should take effect when the title of the Indians was extinguished and they had been removed from the land, whether that was before or after the filing

of the map of definite location of the road; otherwise the grant to the Northern Pacific Railroad Company would be practically a barren one, because nearly all the land through which the proposed road was to run was known as Indian country and subject to the right of Indian occupancy.

Both the District Court and the Court of Appeals in this case held that the right of Indian occupancy was a substantial right and served to except the lands from the grant to the railroad company. This holding is in line with the ruling of the Land Department in *State of Wisconsin*, 19 L. D. 518; *Ma-gee-see* v. *Johnson*, 30 L. D. 125; and *Schumacher* v. *State of Washington*, 33 L. D. 454. We submit that that holding was correct and the only one consistent with the well recognized policy of the Government in its dealings with its Indian wards.

In the case of *State of Wisconsin, supra*, it was held that the Swamp Land Grant to the State did not operate upon lands occupied by Indians, even though there had been no special reservation of the land. In *Ma-gee-see* v. *Johnson*, the Secretary held that lands in the possession of Indians were not public lands within the meaning of the homestead laws; and in the case of *Schumacher* v. *State of Washington*, it was held that the school grant to that State did not operate upon lands that were occupied by an individual Indian. In that case the land was surveyed in 1880, and the grant was made to the State by the Act of February 22, 1889, 25 Stat. 676. It was held

by the Interior Department that as at the date of the survey—the time when the grant took effect, if at all—the land was in the possession of an Indian living separate and apart from his tribe, and improved by him, it was otherwise disposed of within the meaning of the Act making the grant of school lands to the State.

The grant to the railroad company in this case is in no sense a higher one than the grant to a State for common schools, and if land improved and in possession of an Indian is excepted from a grant to a State, it follows, *a fortiori*, that such land is excepted from a grant to a railroad company.

The attitude of the department in this case is shown by the letter of March 16, 1915, from the Commissioner of Indian Affairs to the Indian agent in charge of these Indians, in which it is said, "the general rule has been that if occupancy by the Indian can be shown to be prior to the filing of the map of definite location it would defeat the right of the railroad company." (R. 61.)

We concede that the rulings of the Land Department are not binding upon the courts, but as this court has frequently said, they are entitled to respectful consideration at the hands of any court and should not be overruled without cogent reasons. *United States* v. *Moore*, 95 U. S. 760; *Hastings & Dakota Railroad* v. *Whitney*, 132 U. S. 357; and *Midway Co.* v. *Eaton*, 183 U. S. 602. See also *United States* v. *Boyd*, 68 Fed. 577, where Circuit Judge Simonton said (p. 580):

In determining the attitude of the Government toward the Indians—all Indians—the courts follow the action of the executive and other political departments of the Government, whose more special duty it is to determine such affairs.

III.

Whether there was tribal occupancy of this land is immaterial.

We do not concede that there was never tribal occupancy of the land in controversy. We think that everything in the record indicates that there was tribal occupancy. In the first place, this land is very near if it is not a part of one of the reservations set apart by the unratified treaty with Redick McKee.

The report of the Bureau of Ethnology shows that one of the reservations actually included this land. See p. 788 and Plat 7, California 1, Eighteenth Annual Report of that bureau.

Then, again, the testimony of the Government's witnesses is to the effect that this land was occupied in 1859 by a band or village of Indians, all of whom had died or had gone away except the families now living there.

But it is immaterial whether the land was occupied by a band of Indians, because we contend that the occupancy of the two families was sufficient to except the lands from the grant to the railroad company. We submit that the Indian right of occupancy, of which so much is said in the various Acts of Con-

gress and court decisions, is the mere right to occupy as for the purpose of hunting and fishing, and that it is not the same as actual residence upon the land where the Indians live and make their homes. This latter means more than the mere right of occupancy, and that is what we have in this case—actual residence upon and a high state of improvement of the land. Such lands are not public lands not reserved or otherwise appropriated.

IV.

The Act of March 3, 1851, and the Act of April 8, 1864.

As shown by the title and the provisions of its first section, the Act of March 3, 1851, 9 Stat. 631, was intended for the settlement of private claims in California. The nature of the claims to be settled under the Act is shown by section 8, which declares:

> That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government, shall present * * *, etc.

By section 16, it is made the duty of the Commissioners:

> To ascertain and report to the Secretary of the Interior the tenure by which the *Mission* lands are held, and those held by *civilized* Indians, and those who are engaged in *agriculture or labor* of any kind, and also those which are occupied and cultivated by *Pueblos or Rancheros* Indians.

None of these classes upon which the Commissioners were to report will be found to embrace such Indians as those who improved the land in controversy. Thus we contend these Indians were in no way affected by the Act of 1851. That Act concerned only those who were claiming land from some right derived from the Spanish or Mexican Government.

The case of *Barker* v. *Harvey*, 181 U. S. 481, is not in point. In that case the Mexican authorities had examined the Indians' claim to the land and had found that it had been abandoned, whereupon the grant was made to Warner. Since the Mexican authorities saw fit to disregard the claim of the Indians and grant the land to another, this Government could pursue no other course than to recognize that grant under the terms of the treaty with Mexico. The Indians in that case relied upon rights alleged to have been acquired under Spanish or Mexican Government.

These Indians claim no rights under those Governments. In all probability their ancestors lived in that portion of the country or elsewhere that afterwards became the public domain of the United States before there was any Mexican or Spanish Government in America. The land in controversy is in the extreme northern part of California, where it is a matter of common knowledge there were no Mexican grants, where there was little or no knowledge of Mexican laws, and where it is certain no Mexican laws were ever in force.

Whatever may have been the purpose of the Act of 1864, 13 Stat. 39, the fact remains that no provision was made for these Indians, and they remained without a home except upon the public domain. The small creek upon which these Indians are now located runs through a narrow valley that prior to 1859 was occupied by the ancestors of Maggie Wall and Ellen Ruff. They constituted a tribe or band and in all probability were of the tribes whose chiefs and headmen entered into the treaty with Redick McKee in 1851. How long they may have occupied these lands we do not know, but the evidence is undisputed that they were there as early as 1859, as the two witnesses Luttrell for the Government testified that when they moved to that part of the country in 1859 they saw the Indians living on the lands.

The Indian right of occupancy does not depend upon any direct legislation of Congress. It has its inception in the well established and recognized policy of the Government to protect the Indians in the occupation of the public domain until that right is definitely determined by Congress, and in this Congress will be assumed to treat the Indians as a Christian nation should deal with a dependent and ignorant race. To take their homes away from them by conquest, as suggested by the appellants, without compensation, would illy comport with the treatment that a Christian nation should accord a dependent and ignorant race.

This court has had occasion to consider the Act of 1864, and in that connection it said:

> Beginning shortly after its passage and continuing for a period of at least thirty years thereafter, Congress and the executive practically considered the Act of 1864 as conferring a continuing authority upon the latter and a large discretion about exercising it.
>
> *Donnelly* v. *United States*, 228 U. S. 243, 257.

So far as these Indians are concerned, the authority was never exercised, as they were never placed upon any formally created reservation.

V.

The evidence amply supports the findings of fact.

The evidence amply supports the finding that these Indians occupied the lands prior to the grant to the railroad company. Indeed, the testimony of the Government's witnesses to that effect is not contradicted. True, they say that the Indians may have moved a little from time to time but that a square mile would cover all their movements. When it is observed that the residence of Maggie Wall is just about a mile from Ellen Ruff's, it will be seen that if a mile would cover all their movements they must have occupied the land in controversy all the time.

It is also true that upon the filing of the second amended bill of complaint the defendants offered to prove that by their own statements in the plead-

ings in the ouster suit against them in the State Court the Indians settled on the land as early only as 1873. The trial court refused to permit this to be done upon the ground that the question of residence and occupation was in issue originally and such evidence as the defense had should have been offered at that time.

We claim that whether the Indians themselves made the admission in question, or whether it was really made by counsel who was not fully advised, is altogether immaterial; because, in view of the Indians' ignorance in the matter of dates, any statement made by them would have had no weight against the definite testimony of three intelligent white men to the effect that they saw the Indians living upon the land as early as 1859 and 1864. We have two concurring findings on this question, and under the rule they will not be disturbed by this court unless they are clearly erroneous.

VI.

The attitude of the Government.

It is just as much the duty of the Government to protect the Indians in the occupation of the public domain where no provision is made for them as it is to protect them in the use and possession of the land allotted to them under restrictions.

In the case of *United States* v. *Osage County*, 251 U. S. 128, there was no express statute authorizing the Government to sue on behalf of the Indians, and

the Act of 1917 was referred to by the court in that case as being merely a congressional recognition of an authority already existing. Certain it is that that Act did not of itself purport to authorize a suit by the United States, but the authority to sue existed in the Government in that case, as it does in this, because it exists nowhere else.

Neither the Act of June 21, 1906, 34 Stat. 353, involved in *United States* v. *Waller*, 243 U. S. 452, nor the Act of May 8, 1906, 34 Stat. 182, amending the General Allotment Act, has any bearing whatever upon this case. Both have to do with the issue of fee simple patents to Indian allottees and the effect of such patents when issued.

It was in no way necessary that the Government should have an interest in the land in order to entitle it to bring this suit. It is enough if the Government have an interest in the Indian occupants and is under an obligation to them. *United States* v. *Beebe*, 127 U. S. 338.

As said by this court in *United States* v. *New Orleans Pac. Railway Co.* 248 U. S. 507, 518:

> A pecuniary interest in the relief sought is not essential; it is enough if there be an interest or concern arising out of an obligation to those for whose benefit the suits are brought.

Clearly the Government was under an obligation here to protect its Indian wards whom it had placed at the mercy of the railroad company by issuing to the latter a fee simple patent for the lands which embraced the Indians' homes.

The Government in this case has always relied upon the Indians' use and occupation of the land for cause of action. In the first amended bill of complaint it is specifically stated that "for many years prior to July 21, 1904 (the date of the patent to the railroad company), and from time immemorial" the lands were used and occupied by the Indians (R. 2); and again, "the lands described in the bill of complaint are now and have been for over forty years last past occupied by Maggie Wall and Ellen Ruff, full-blood Indians, and by George Wall, a half breed." (R. 3.) It is also stated in the bill of complaint that the lands were included in the reservation set apart by the unratified treaty of 1851 by Redick McKee, which it was said was still pending before the Senate. That statement was made because counsel for the Government did not at that time know that the treaty had been rejected by the Senate. There has never been a change of parties. The first bill was brought on behalf of the Indians, and that clearly appears from a reading of the entire bill, even though it is not expressly stated in the introduction. We submit that the amendment to that effect was not necessary, but the suggestion was made by the trial court of its own motion and adopted by counsel.

We can not agree with counsel that this case should have been abated upon the suggestion in the record that another case involving possession of the land was pending in the State court. This is a suit

to cancel the patent that was issued to the railroad company, and that could be accomplished only by a direct attack upon the patent instituted by the Government itself. In *Mercantile Trust Co.* v. *Lamoille Valley Railroad Co.*, 16 Blatch. 324, 17 Fed. cases No. 9432, it is said—

> there is nothing either in the letter or the spirit of the statute (R. S. 720) that prohibits a party having a question of right or a claim to relief that can be determined without meddling with the possession of any court, from having the question determined or the relief granted by any court of competent jurisdiction for the purpose (p. 327.)

Speaking on the same subject, this court said:

> But it is not true that a court having obtained jurisdiction of a subject matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and in some instances requiring the decision of the same questions exactly.
>
> *Buck* v. *Colbath*, 3 Wall. 334, 345.

And again:

> It is only while the property is in the possession of the court, either actually or constructively, that the court is bound or professes to protect that possession, from the process of other courts, p. 342.

VII.

This cause is not barred by the statute of limitations.

If, as we contend, the land is not public land, the suit is not barred by the statute of limitations. *Northern Pacific Railroad Co.* v. *United States*, 227 U. S. 355. Viewed as a suit to enforce the trust impressed upon the railroad title, in favor of the Indian occupants, it may be said that there is no limitation upon the right of the Government to bring it.

Statutes of limitation against the sovereign should be strictly construed and applied only to those cases that fall clearly within them.

> "The United States * * * are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound."
>
> (*United States* v. *Whited and Wheless*, 246 U. S. 552.)

In *Northern Pacific Railroad Co.* v. *United States*, *supra*, it was held that the statute of limitations did not bar a suit by the United States to recover lands included within an Indian reservation.

VIII.

The Government is not estopped.

The Government is not estopped to bring this suit, either because of the patent to the railroad company or because of the leases it took from the company through its officers and agents. If by the mere fact of the issue of a fee simple patent the United States is precluded from bringing a suit, it follows that the

Government may not bring suit to cancel a patent in any case, however improperly it may have been obtained. We know that this is not the law. So far as the leases are concerned, it may be said that they were entered into by officers and agents of the United States without authority. If, as we contend, the land was excepted from the grant to the railroad company, or, even if the grant were only burdened by the right of Indian occupancy, the act of the Government's agents in taking the leases was unauthorized and beyond the scope of their authority. It is well settled that the Government is not bound by the unauthorized acts of its agents or by their default or negligence.

Nor can Fred W. Cramer and Ira B. Cramer, who are said to be the beneficially interested parties, claim to be innocent purchasers, because they took with notice of the Indians' possessions. *Winona, etc., Railroad* v. *United States*, 165 U. S. 483, 485.

CONCLUSION.

It is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

JAMES M. BECK,
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JANUARY, 1923.

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